Supreme Court, U.S.
FILED
FEB 12 1993
OFFICE OF THE CLERK

(2)

No. 92-1012

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

---

BRIEF OF *AMICI CURIAE* THE AMERICAN FOREST AND PAPER ASSOCIATION AND UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

LYNN AGEE
UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO, CLC
P.O. Box 1475
Nashville, Tennessee 37202
(615) 934-8590

ROBERT F. SHAPIRO
(Counsel of Record)
ALISA L. STRATTON
CHADBOURNE & PARKE
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000
Attorneys for The American Forest and Paper Association

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

TABLE OF CONTENTS

	Page
STATEMENT	2
ARGUMENT	5
I. *AMICI CURIAE* SEEK THIS COURT'S DETERMINATION OF THE LIMITED SCOPE OF A STATE'S AUTHORITY UNDER § 401 OF THE CWA TO PREVENT ADVERSE EFFECTS TO THE PAPER INDUSTRY	5
II. UNDER THE FPA, CONGRESS VESTED IN FERC BROAD AUTHORITY TO COMPREHENSIVELY EVALUATE AND BALANCE THE MANY ASPECTS OF THE PUBLIC INTEREST AFFECTED BY HYDROELECTRIC PROJECTS	7
A. Within Its Broad Jurisdiction, FERC Was Granted The Exclusive Authority To Consider And Protect The Aesthetics And Recreational Qualities Of A Hydroelectric Project	7
B. FERC Exercises Its Jurisdiction Over Aesthetics And Recreation By Imposing Conditions Which Supersede Any Imposed By The States	9
C. FERC's Exercise Of its Statutorily Mandated Authority To Balance Various Power And Non-Power Values, Including Aesthetics And Recreation, Precludes States From Doing So In The § 401 Water Quality Certificate	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

California v. FERC, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990) 3, 5, 7, 12, 13
First Iowa Hydro-Elec. Coop. v. FPC, 328 U.S. 152 (1946) 2, 3, 7, 11, 12
Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991) 3
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 7, 12
Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation, 1993 N.Y. App. Div. Lexis 65, 1993 WL 2586 (N.Y. App. Div. 1993) 3
Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190 (1983) 7, 12
In re Power Auth. v. Williams, 60 N.Y.2d 315, 457 N.E.2d 726 (1983) 4
Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982) 3
Summit Hydropower v. Commissioner of Envtl. Protection, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Sup. 1992) 3, 4
United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) 3

ADMINISTRATIVE DECISIONS

Appomattox River Water Auth., 58 FERC ¶ 62,115 (1992) 10, 11
Central Maine Power Co., 52 FERC ¶ 61,033 (1990) 4, 11
French Paper Co., 54 FERC ¶ 62,134 (1991) 7
Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana, 59 FERC ¶ 62,133 (1992) 9, 10, 11
International Paper Co., 51 FERC ¶ 62,330 (1990) 7
Joseph M. Keating, 60 FERC ¶ 61,016 (1992) 9, 10, 11
Long Lake Energy Corp., 58 FERC ¶ 62,041 (1992) 10, 11
Midtec Paper Corp., 56 FERC ¶ 62,226 (1991) 7

TABLE OF AUTHORITIES—Continued

	Page
Moon Lake Elec. Ass'n, 61 FERC ¶ 62,030 (1992)	9, 10, 11
Niagara Mohawk Power Corp., 58 FERC ¶ 62,114 (1992)	10, 11
Niagara Mohawk Power Corp., 61 FERC ¶ 62,170 (1992)	10
Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc., 58 FERC ¶ 61,347 (1992)	9, 10, 11
Pacific Gas and Elec. Co., 60 FERC ¶ 62,256 (1992)	9, 11
Summit Hydropower, 61 FERC ¶ 61,010 (1992)	9
Summit Hydropower, The Dayville Corp., 59 FERC ¶ 62,351 (1992)	9, 11
Summit Hydropower, 58 FERC ¶ 62,169 (1992)	9, 10, 11
Town of Summersville, 60 FERC ¶ 61,291 (1992)	4, 11

STATUTES

Federal Power Act, 16 U.S.C. §§ 797(e), 803(a) (1982 ed.)	
§ 4(e), 16 U.S.C. § 797(e)	8
§ 10(a), 16 U.S.C. § 803(a)	8
Federal Power Act, 16 U.S.C. §§ 791-828 (1988)	
§ 4(e), 16 U.S.C. § 797(e)	3, 8
§ 10(a)(1), 16 U.S.C. § 803(a)(1)	3, 8
§ 10(a)(3), 16 U.S.C. § 803(a)(3)	8
§ 15, 16 U.S.C. § 808	5
Clean Water Act ("CWA"), 33 U.S.C. § 1251-2623 (1988)	
§ 301, 33 U.S.C. § 1311	3
§ 302, 33 U.S.C. § 1312	3
§ 303, 33 U.S.C. § 1313	4
§ 306, 33 U.S.C. § 1316	3
§ 307, 33 U.S.C. § 1317	3
§ 401, 33 U.S.C. § 1341	*passim*
§ 401(a)(1), 33 U.S.C. § 1341(a)(1)	2
§ 401(d), 33 U.S.C. § 1341(d)	3, 4

REGULATIONS

18 C.F.R. §§ 380.1-380.14	9
18 C.F.R. § 380.3(c)(1)	9

TABLE OF AUTHORITIES—Continued

	Page
18 C.F.R. Part 4	9
18 C.F.R. § 4.38	8
18 C.F.R. Part 16	9
40 C.F.R. Part 131	4
40 C.F.R. § 131.2	5
40 C.F.R. § 131.5	5
40 C.F.R. § 131.6	5
40 C.F.R. § 131.10	5
40 C.F.R. § 131.11	5
Vermont Water Quality Standards VWQS Section 3-03	5
MISCELLANEOUS	
Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* (April 1990)	6
Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986)	8
National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1012

SIMPSON PAPER (VERMONT) COMPANY,
Petitioner

v.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION and SIERRA CLUB

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

---

BRIEF OF *AMICI CURIAE* THE AMERICAN FOREST AND PAPER ASSOCIATION AND UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO, CLC IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The American Forest and Paper Association ("AFPA") and United Paper Workers International Union, AFL-CIO, CLC ("UPIU") submit this brief in support of the Petitioner Simpson Paper (Vermont) Company.[1]

AFPA is an association of the pulp, paper, paperboard and forest products industry which, as a group, is the third largest industrial purchaser of electricity from electric utilities in the United States, and is one of the Nation's leaders in the development and use of hydro-

---

[1] The parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of the Court.

electric power. The involvement of AFPA members as owners and operators of hydroelectric power under the Federal Power Act ("FPA") demonstrates AFPA's substantial interest in this proceeding.

UPIU is an international labor organization of paperworkers with members at paper mills, paper products plants, and other related industries throughout the United States and Canada. UPIU has over 225,000 members. UPIU's members are employed in numerous paper mills dependent on hydropower, and have a substantial interest in this case because of its impacts on the economics of paper production.

STATEMENT

Amici curiae adopt by reference the Statements of Statutory and Regulatory Background, The Gilman Hydroelectric Project, and Proceedings Below set forth in the Brief for the Petitioner Simpson Paper (Vermont) Company ("Simpson") with this Court.

The Court is asked to resolve an issue substantially similar to an issue which it faced in Iowa forty years earlier: whether Congress intended to allow states to regulate through permit requirements, such as the § 401 water quality certificate,[2] the very requirements that Congress has placed within the discretion of the Federal Energy Regulatory Commission ("FERC" or the "Commission") under the FPA. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 165 (1946). In light of the estimated 200 hydro projects, many of which are owned by paper and forest industries, to be relicensed by FERC between 1990 and 1993, as well as many others that must be relicensed in this decade, it is imperative that the

[2] Section 401(a)(1) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a)(1) (1988), requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification (or waiver thereof) from the state in which the discharge originates.

Court settle the federal question of the scope of a state's authority under § 401 so that FERC's mandate under the FPA to evaluate and balance all aspects of a hydro project prior to licensing or relicensing[3] is not undermined.

Section 401 was intended to authorize the states to issue a certificate relating *solely* to water quality.[4] States have begun to invade FERC jurisdiction by the imposition of conditions unrelated to water quality under § 401. States have had virtually unbridled discretion to impose such conditions because there is no lower federal court review.[5] Although a few states have restricted the scope of their § 401 certificates to water quality,[6] con-

---

[3] *See* FPA §§ 4(e), 10(a)(1), 16 U.S.C. §§ 797(e), 803(a)(1) (1988).

[4] CWA 401(d), 33 U.S.C. 1341(d) (1988). § 401(d) of the CWA requires that state certifications impose limitations and monitoring requirements necessary to ensure compliance with: standards for effluent limitations under § 301 or § 302 of the CWA, 33 U.S.C. §§ 1311, 1312; national standards of performance for the control of discharges under § 306 of the CWA, 33 U.S.C. § 1316; or effluent pretreatment standards, including prohibiting the discharge of certain effluents, under § 307 of the CWA, 33 U.S.C. § 1317; and any other appropriate requirement of state law set forth in such certification. However, a "requirement of state law" that would otherwise impinge upon FERC's comprehensive authority over hydroelectric licensing would not be "appropriate." *See California v. FERC*, 495 U.S. 490, 506-07, *reh'g denied*, 110 S.Ct. 3304 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946).

[5] The lower federal courts have consistently held that the CWA requires that challenges to § 401 certifications be made in the state courts. *E.g., Roosevelt Campobello Int'l Park Comm'n. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989).

[6] *See, e.g., Niagara Mohawk Power Corp. v. New York State Dep't of Envtl. Conservation*, 65306, 1993 N.Y. App. Div. Lexis 65, 1993 WL 2586 (N.Y. App. Div. January 7, 1993) (denying state statutory and regulatory requirements, including the imposition of recreational opportunities and the like, under § 401 because reserved by the FPA for determination at the Federal level); *Summit Hydro-*

sistent with the intent of § 401, other states have used the CWA § 401 process to impinge on FERC's authority,[7] thus creating a lack of uniformity in the interpretation of § 401.

The decision below in *Georgia-Pacific Corp. and Simpson Paper (Vermont) Co., Inc. v. Dept. of Envtl. Conservation and Sierra Club* (Pet. App. 1a-4a) clearly exemplifies state overreaching under § 401. The Supreme Court of the State of Vermont ("Vermont Supreme Court") upheld the Vermont Department of Environmental Conservation's ("Vermont") imposition of a continuous spillage condition in a § 401 water quality certificate on the grounds that "aesthetics" and "recreation" alone were appropriate grounds on which to justify the condition under § 401 (Pet. App. 3a).[8] Conditions based on "aesthetics" and "recreation", however, are within the exclusive jurisdiction of FERC and are unrelated to the § 401 water quality certification process.[9] Consequently,

---

power v. Commissioner of Envtl. Protection, CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241 (Conn. Sup. July 20, 1992) (holding that a minimum spill requirement based on subjective aesthetic impact beyond the scope of the state agency's § 401 authority); *In re Power Auth. v. Williams*, 60 N.Y.2d 315, 457 N.E.2d 726 (N.Y. 1983) (determining whether a hydroelectric project would meet applicable water quality standards does not include balancing the need for the project against adverse environmental impacts under state energy law and master plan).

[7] *See infra* note 19.

[8] The Vermont Supreme Court never discussed or even indicated that this finding related to the quality of water in the Connecticut River.

[9] The Vermont Supreme Court seemingly relied on the language of § 401(d) of the CWA, 33 U.S.C. § 1341(d), which allows state certification to be conditioned on compliance with "any other appropriate requirement of state law". Although Vermont's Water Quality Standards ("VWQS"), approved pursuant to CWA § 303 and 40 C.F.R. Part 131, refer to aesthetics and recreation, aesthetics is designated as a "value" to be pursued, and recreation is desig-

to allow Vermont to impose the spill requirement, which would limit power production and force Simpson to purchase additional commercial power,[10] without any basis in objective water quality standards, would be to sanction Vermont's exercise of jurisdiction that is reserved exclusively for FERC.

ARGUMENT

I. *AMICI CURIAE* SEEK THIS COURT'S DETERMINATION OF THE LIMITED SCOPE OF A STATE'S AUTHORITY UNDER § 401 OF THE CWA TO PREVENT ADVERSE EFFECTS TO THE PAPER INDUSTRY

If states are allowed to continue their abuse of § 401 authority by imposing non-water quality conditions on a § 401 certificate, it will "fundamentally [] restructure a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process." *California v. FERC*, 495 U.S. 490, 500, *reh'g denied*, 110 S.Ct. 3304 (1990). Under the FPA, FERC has the authority to issue original licenses and license renewals, which must be obtained when the original license term expires. § 15, 16 U.S.C. § 808 (1988). Presently FERC estimates that there are 320 existing licenses which are to expire before the year 2000, 55% of which are to expire

---

nated as a "use" to be protected. VWQS, Section 3-03. The EPA, which approved such standards, however, indicated that "values" and "uses" are goals which are to be achieved through the implementation of objective, measurable water quality "criteria". *See* 40 C.F.R. §§ 131.2, 131.5, 131.6, 131.10, 131.11 (1992) (*See* Pet. Br., pp. 21-25).

[10] Simpson, in a letter dated May 20, 1992, to the Vermont Supreme Court, estimates substantial economic costs at $120,000 per year to comply with the aesthetic and recreational requirement (Pet. Br., p. 16 n.34).

in the year 1993.[11] A large percentage of these licenses are held by paper companies [12] due to historic mill locations along waterways and the inability to obtain utility system electricity early in this century at the mills' remote locations. Hydroelectric power provides this energy intensive industry with an inexpensive, clean, renewable source of energy. Curent holders of hydroelectric licenses, particularly in the paper industry, which have filed or will file for FERC relicensing will be profoundly affected by the states' exercise of jurisdiction in areas such as recreation and aesthetics because such jurisdiction has always resided with FERC. *See Infra* pp. 9-11. To sanction a state's imposition of recreation and aesthetic conditions through § 401 will not only create administrative inefficency from the duplicative and possibly conflicting efforts of individual states and FERC, but licensees' expectations as to anticipated recreation and aesthetic requirements for purposes of relicensing will be frustrated.

Moreover, if states are allowed to impose costly conditions unrelated to water quality, there will be far-reaching environmental and economic effects on the paper industry. Because many in the paper industry are disproportionately dependent on hydropower, states requiring onerous conditions under the guise of § 401 may reduce power available from existing projects, force hydropower plant shutdowns by denying certification, force shutdowns for economic reasons, or prevent proposed projects from being built. In some the elimination or reduction in the use of hydroelectric power by the paper industry will result in: a loss of an inexpensive, clean, renewable energy source only to be replaced by fossil fuel, which contributes to air and water pollution; [13] an

---

[11] Federal Energy Regulatory Commission, *Hydroelectric Project Relicensing Handbook* 1 (April 1990).

[12] Federal Energy Regulatory Commission, *supra* Note 11, §§ 6-9.

[13] In many instances, the mills may not be allowed, under their state air or water permits, to increase the use of fossil fuel to

increase in electric rates and financial hardship to ratepayers because they will have to purchase replacement power to serve the manufacturing plants; and a loss of benefits related to specific projects such as a tax base, job growth, business income, and environmental and recreational benefits.[14]

II. UNDER THE FPA, CONGRESS VESTED IN FERC BROAD AUTHORITY TO COMPREHENSIVELY EVALUATE AND BALANCE THE MANY ASPECTS OF THE PUBLIC INTEREST AFFECTED BY HYDROELECTRIC PROJECTS

A. Within Its Broad Jurisdiction, FERC Was Granted The Exclusive Authority To Consider And Protect The Aesthetics And Recreational Qualities Of A Hydroelectric Project

This Court has stated on several occassions that FERC has broad planning authority in the development and licensing of hydroelectric power under the FPA. *See California v. FERC*, 495 U.S. 490, 499, *reh'g denied*, 110 S.Ct. 3304 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982). Moreover, the Court has made clear that FERC has exclusive authority under the FPA to comprehensively evaluate and balance the many aspects of the public interest affected by hydroelectric projects. 495 U.S. at 499-500; 328 U.S. at 168.

---

replace the loss of hydroelectric power thus forcing the mill to purchase very high cost electricity.

[14] In issuing licenses for hydroelectric projects, FERC assesses alternatives to the proposed projects. This includes examining the detrimental effects to the community in the event the project is not licensed as proposed. *See, e.g., Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC ¶ 61,347 (1992); *Midtec Paper Corp.*, 56 FERC ¶ 62,226 (1991); *French Paper Co.*, 54 FERC ¶ 62,134 (1991); *International Paper Co.*, 51 FERC ¶ 62,330 (1990).

Section 4(e) of the FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U.S.C. § 797(e) (1982 ed.). Section 10(a) of the FPA also authorizes FERC to issue licenses subject to conditions that FERC deems best suited for power development and other public uses of the waters. 16 U.S.C. § 803(a) (1982 ed.). Congress' subsequent amendments to the above provisions explicitly state that FERC is to consider a project's effect on and adequate protection, mitigation and enhancement of beneficial public uses, including *recreation* opportunities, as well as "power and development purposes." 16 U.S.C. §§ 797(e), 803(a)(1) (1988). These 1986 amendments to the FPA, which require FERC to consider, *inter alia*, recreational opportunities and environmental quality as part of the licensing process, indicate that Congress intended such matters to remain within the Federal domain as factors to be balanced against other federal concerns, such as the power and development purposes of the proposed facility for which a license is sought. As Congress indicated in its Conference Report, "[i]f non-power values cannot be adequately protected, *FERC* should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986) (emphasis added). It is also instructive that Congress has directed FERC to consider any comprehensive plan prepared by a state, and FERC must solicit and entertain recommendations of state agencies regarding recreation, among other concerns. § 10(a)(3), 16 U.S.C. § 803(a)(3) (1988). Indeed, a consultation procedure insures that states will have an opportunity to have input on the panoply of non-power issues. 18 C.F.R. § 4.38 (1982). This is a further indication that environmental and conservation factors, including those relating

to aesthetics and recreation, of concern to a state are to be weighed at the Federal level.[15]

B. FERC Exercises Its Jurisdiction Over Aesthetics And Recreation By Imposing Conditions Which Supersede Any Imposed By The States

As mandated by the EPA, FERC takes very seriously its exclusive jurisdiction to balance competing interests, including recreation, aesthetics, and other non-developmental values equally with power and other developmental values in determining whether and under what conditions a license should be issued.[16] With respect to aesthetics and recreation, FERC independently examines any adverse effects of the project on aesthetic and recreational qualities of the project area and regularly imposes conditions in the license to mitigate such adverse effects, if any.[17]

---

[15] In addition, under its regulations implementing the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (42 U.S.C. §§ 4321-4347 (1988)), FERC assesses potential impacts on water quality, fish, wildlife and botanical resources, historic and archeological resources, recreational resources, land management, and aesthetics. 18 C.F.R. §§ 380.1-380.14 (1982). Information FERC must evaluate is set forth in FERC's regulations establishing requirements for license applications. 18 C.F.R. Parts 4, 16. *See* 18 C.F.R. § 380.3(c)(1).

[16] *See, e.g., Summit Hydropower*, 61 FERC ¶ 61,010 (1992) (Rescinding a project license after taking into account all the circumstances of the case, including the various possible forms of mitigation and their effects on project economics, on the grounds that the unique recreational, aesthetic, and historical features of the site were of greater public benefit than the use of the site for water-power development).

[17] *See, e.g., Moon Lake Elec. Ass'n*, 61 FERC ¶ 62,030 (1992); *Pacific Gas and Elec. Co.*, 60 FERC ¶ 62,256 (1992); *Joseph M. Keating*, 60 FERC ¶ 61,016 (1992); *Summit Hydropower, The Dayville Corp.*, 59 FERC ¶ 62,351 (1992); *Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana*, 59 FERC ¶ 62,133 (1992); *Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC ¶ 61,347 (1992); *Summit*

Such imposition of aesthetic and recreational licensing conditions are the result of the Commission staff's comprehensive review in an environmental assessment of the project. Although state consultation is a part of the federal process, FERC ultimately retains control over the imposition of aesthetic and recreational conditions by reserving the right to approve and require changes to the project plan.[18] FERC has clearly indicated that it is FERC's conditions relating to aesthetics and recreation, not those proposed by the state, that govern. *See, e.g., Niagara Mohawk Power Corp.*, 61 FERC ¶ 62,170 (1992) (noting the state of New York's request that any license issued for the project include a condition that requires the licensee to prepare a recreation plan and also cooperate with the state agency, FERC found that the recreational opportunities provided at the project met current demands; FERC ordered the licensee to consult with the appropriate agencies and prepare a recreation plan for the project, subject to Commission approval and modification, if and only if, a current ban on fishing downstream of the project was lifted which would result in a sharp increase in recreational use). In recent orders, FERC has recognized that states have begun to interfere with its jurisdiction to comprehensively evaluate projects by imposing conditions which are completely unrelated to the maintenance or improvement of water quality in their state certificates. FERC has indicated that conditions relating to recreation and aesthetics, *inter alia*,

---

Hydropower, 58 FERC ¶ 62,169 (1992); *Niagara Mohawk Power Corp.*, 58 FERC ¶ 62,114 (1992); *Appomattox River Water Auth.*, 58 FERC ¶ 62,115 (1992); *Long Lake Energy Corp.*, 58 FERC ¶ 62,041 (1992).

[18] *See, e.g., Moon Lake Elec. Ass'n*, 61 FERC at 63,043; *Joseph M. Keating*, 60 FERC at 61,072; *Granite County, Montana, Montana Power Co. and Montana Power Co. & Granite County, Montana*, 59 FERC at 63,375; *Northern Hydro Consultants, Inc., C&A Wallcoverings, Inc.*, 58 FERC at 62,138-39.

are beyond the scope of § 401 and pose actual or potential conflicts with the Commission's license.[19]

FERC also exercises continuing jurisdiction over aesthetics and recreation. FERC inserts an article in every license that in the event the licensee conveys fee title to, easements or rights-of-way across, or leases of project lands for specific, pre-approved purposes set forth in the license, the Commission "reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of the article, for the protection and enhancement of the project's scenic [and] recreational . . . values".[20]

C. FERC's Exercise Of Its Statutorily Mandated Authority To Balance Various Power And Non-Power Values, Including Aesthetics And Recreation, Precludes States From Doing So In The § 401 Water Quality Certificate

To give effect to Vermont's aesthetic and recreational conditions unrelated to water quality would interfere with Congressional intent to reside with the Commission the exclusive authority to balance the competing considerations affecting the public interest in hydroelectric licensing. As the Court stated in *First Iowa*, which involved a state's attempt to impose a similarily broad state permitting requirement on a hydroelectric project under the

---

[19] *Town of Summersville*, 60 FERC 61,291, at 61,990 (1992) (State of West Virginia requiring licensee under the water quality certification to construct or provide a substantial number of recreation facilities; such as access roads and paths, low water stepping stone bridges, fish attraction structures, a boat launching facility, a residence and storage building, and to provide funds for fish and wildlife management programs) rehearing granted for purpose of further consideration; *Central Maine Power Co.*, 52 FERC ¶ 61,033, at 61,172 (1990) (State of Maine requiring in the water quality certificate that a schedule for the recreational facilities plan among other project operations be subject to state approval).

[20] *See* cases cited in note 17, *supra*, as examples.

jurisdiction of the FPC, to require the hydro applicant to secure a state permit would ultimately "vest in states a veto power over federal projects" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" which has been given to FERC. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946) (*"First Iowa"*).[21] The Court in *First Iowa* rejected the possibility of concurrent jurisdiction and interpreted the FPA as mandating divided powers and "a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter." *Id.* at 171; *see id.* at 174 (no "divided authority over any one subject"); *id.* at 181 (comprehensive federal role "leave[s] no room or need for conflicting state controls"); *id.* at 168 ("Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority").

Recently, this Court reaffirmed *First Iowa* and reiterated that the federal government pre-empts states under the FPA. *California v. FERC*, 495 U.S. 490, *reh'g denied*, 110 S.Ct. 3304 (1990) (*"California"*). In *California*, the Court found that the FPA and the federal license conditions established pursuant to the Act pre-empt the states' conditions concerning stream flow requirements because "it would disturb and conflict with the balance embodied in that considered federal agency determination." *Id.* at 506. According to the Court, Congress directed that in the FPA § 10(a) FERC and not the states should set the conditions of the license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the

---

[21] The broad and paramount federal regulatory role under the FPA, established in *First Iowa*, has been consistently upheld. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982).

project would be economically feasible, and thus further power development. *Id.* In light of this recent Court pronouncement, there should be little question that Vermont's requirements unrelated to water quality interfere and conflict with FERC's comprehensive statutorily-mandated authority to balance various power and non-power values, including aesthetics and recreational concerns. This issue is of national importance, as it will greatly affect the country's energy future.

CONCLUSION

Accordingly, *amici curiae* AFPA and UPIU respectfully request that the petition for a writ of certiorari filed by Simpson should be granted.

Respectfully submitted,

LYNN AGEE
UNITED PAPER WORKERS
INTERNATIONAL UNION,
AFL-CIO, CLC
P.O. Box 1475
Nashville, Tennessee 37202
(615) 934-8590

ROBERT F. SHAPIRO
(Counsel of Record)
ALISA L. STRATTON
CHADBOURNE & PARKE
1101 Vermont Avenue, N.W.
Washington, D.C. 20005
(202) 289-3000
Attorneys for The American Forest and Paper Association